Before the
Federal Communication Commission (FCC)
Washington, D.C.

In the Matter of:	)	
Rules and Regulations Implementing the Telephone Consumer Protections Act of 1991	)	CG Docket No. 02-278
Junk Fax Prevention Act of 2005	)	CG Docket No. 05-338

Comments and Recommendations of
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To Chairman Kevin J. Martin, Commissioner Michael Copps, Commissioner Jonathan Adelstein, and Commissioner Deborah Taylor Tate:

In a recent Notice of Proposed Rulemaking and Order dated December 9, 2005, the FCC requested comments on several issues regarding amending the Junk Fax Prevention Act of 2005, which is codified in 47 U.S.C.S. § 227. The focus of this letter will be commenting on paragraph 17 of the Notice of Proposed Rulemaking and Order which requested comments on "whether it is appropriate to limit the [Established Business Relationship] duration for unsolicited facsimile advertisements in the same manner as telephone solicitations."

I. Telephone Solicitation Information and Durational Limits:

Congress recognized that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety. (6) Many consumers are outraged [at] the proliferation of intrusive, nuisance calls to their homes from telemarketers." H.R. Rep. No. 102-317. However, Congress also realized that many businesses receive a large amount of revenue from these unsolicited telemarketing calls. Id. ("According to Telemarketing Magazine, U.S. expenditures on telemarketing have grown from $1 billion to $60 billion over the past 10 years. Meanwhile, the dollar value of telemarketing sales has grown from just over $80 billion in 1984 to $430 billion in 1990." Id.) Therefore, Congress' goal was stated as, "Individual's privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits the legitimate telemarketing practices." Id.

One area that Congress exempted from the restriction on solicitation was the category known as those businesses, people, or entities that have an established business relationship with the telemarketing company/business. Although Congress stated, "an enterprise having an 'established business relationship' with a subscriber should be permitted to solicit the subscriber even if the subscriber otherwise objected to unsolicited calls," Congress limited the definition of "established business relationship" as a relationship that "could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a *reasonable period of time*." Id. (italics added for emphasis) By limiting an established business relationship to a reasonable time, Congress limited the exemption that they gave to any and all individuals or businesses that fell within this category.

In response to Congress' findings and statements, the Federal Communications Commission enacted 47 CFR 64.1200(f)(3), which defined the term "established business relationship" (EBR) as a relationship formed "with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party." Id.

In determining whether the eighteen (18) and three (3) month limitations are constitutional, courts would apply the two part Chevron test. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837, 104 S. Ct. 2778 (1984). The first test is whether Congress directly spoke on the issue leaving no room for ambiguity. In this instance, Congress only required that the time be "reasonable." Since reasonable is one of the most amorphous and ambiguous terms, the courts would move on to the second part of the Chevron test, which is a deference to the agency's interpretation unless it is unreasonable. There is no evidence that 18 months is unreasonable as a time limitation for consumers falling with the EBR category. Therefore, if this regulation were to be constitutionally challenged, it would pass under the Chevron test.

II. Junk Fax Prevention Act Time Durational Discussion:

The FCC proposed to use the same time limitations as the telemarketing solicitations. If enacted, businesses would be allowed to send "junk faxes" to people or entities that fell within the "established business relationship" category. In order to fall within this category, a person or entity must purchase or have some sort of financial interaction with the business.

A. Arguments/Reasons For Keeping the 18/3 Month Duration for the "Established Business Relationship" Category:

Since receiving an unsolicited telephone call is similar to receiving an unsolicited facsimile, both methods should be regulated in the same manner. Telemarketers call individuals or businesses in hopes of persuading them to purchase their product or service. A fax advertisement serves the same purpose. In order to accomplish their purpose, both methods utilize the phone lines in order to convey their solicitation/advertisement. In addition, most consumers view telemarketers and fax solicitations as intrusive and unwanted. Congress and the FCC understood the impact that telemarketers had on the public, yet they still allowed the telemarketers to continue calling people for 18 months after making an initial purchase. Therefore, faxes should receive the same treatment and be allowed to be sent to consumers 18 months after a purchase or 3 months after an initial inquiry about a product.

Another argument for keeping the 18/3 month durational limits is that customers should be kept updated and informed about their products. For instance, when dealing with software or other computer related products, there are often updates or upgrades that a previous customer would most likely want and/or be entitled to. However, individually calling every previous customer might place too great of a burden on the company. A fax machine, on the other hand, would be able to send out the information to all of the customers in a more efficient manner.

In addition to keeping customers updated, allowing businesses to send out advertisements to customers stimulates commerce. Congress' fact finding stated that the dollar value of telemarketing sales has grown tremendously. *supra*. Allowing businesses to continue contacting their customers generates commerce, which helps to strengthen the American economy. Since I am not an economist, I do not have the knowledge nor the ability to determine what would happen if companies were not allowed to use faxes as a means of solicitation; however, I would like to say that if this restriction interferes with the business' ability to generate revenue, then it will have a negative impact on the business, which in turn would affect the overall economy.

For the foregoing reasons, people would argue that the durational limits should be kept at 18 months after a purchase and 3 months after an initial product inquiry.

B. Arguments/Reasons For Not Keeping the 18/3 Month Duration for the "Established Business Relationship" Category:

The key difference between telemarketing and fax advertising is the economic factor. With telemarketing, the cost remains on the advertiser because they initiate the call and incur all of the costs associated with the call. However, with faxes the cost shifts to the consumer. The advertiser need only make one copy of their advertisement and then send it to multiple fax machines. The receiving fax machine would use the recipient's ink/toner and paper to print out the advertisement. In this way, the advertiser is shifting the cost of the advertisement to the consumer.

One of the reasons why Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, was to protect consumers from unwanted advertising costs. see Missouri ex rel. Nixon v. Am. Blast Fax, Inc., 323 F.3d 649, 658 (8th Cir. Mo. 2003). This purpose is evident in 47 U.S.C. § 227(b)(1)(A)(iii), which states that it is unlawful to make a call using any automatic telephone dialing system "to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the *party is charged* for the call." (italics added for emphasis).

The counterargument is that the cost to the consumer is very minimal and not worth considering. According to www.officedepot.com and www.staples.com, the price of paper is $5.49 and $7.68, respectively, for a ream, which is 500 sheets. The cost of paper per sheet amounts to $0.01 and $0.015. In addition, the cost of toner (Brother TN-460 Toner Cartridge High Yield), for offices using a laser fax machine, is $69.59 and $72.99. Each toner cartridge is stated to yield 6000 pages. As a result, the cost per page is roughly around $0.01. For offices using inkjet fax machines, the cost per page is roughly around $0.06.[1] Therefore, the total cost per page of advertisement should be around $0.02 for offices using a laser fax machine and $0.07 for offices using an inkjet fax machine.[2]

According to these numbers, it seems that businesses / individuals are hardly inconvenienced by receiving a couple of faxes a year. However, these numbers do not reflect the cost of labor that businesses must bear in order to sort out the "junk faxes" from those that are not solicitations. In a written statement of K. Dane Snowden, Chief Consumer & Governmental Affairs Bureau Federal Communications Commission, before the Energy and Commerce Subcommittee on Telecommunications and the Internet United States House of Representatives on June 15, 2004, he stated, "both small and large [businesses] are burdened by the time spent reading and disposing of faxes. In addition, the record demonstrated that when fax machines must print unsolicited advertisements and are not operational for other purposes, there is a loss in productivity for those businesses." 2004 FCC LEXIS 3184.

[1] Based on Brother PC-201 Fax Cartridge, which costs $28.79 at officedepot.com and $26.99 at staples.com, and each cartridge is stated to yield 450 pages; therefore, the cost per page is around $0.06

[2] Toner and Ink were chosen based on a random selection of two fax machines, Brother Intellifax 5750e (laser) and Brother Intellifax PPF-1270e (inkjet)

One reason why businesses might have a difficult time determining whether faxes are "junk" or not is that "senders of junk faxes often disguise their identities with aliases, acronyms, or simply provide no identifying information whatsoever." Id. As a result, the people that must sort through the faxes might exert a considerable amount of time and/or energy trying to determine whether the fax is part of another fax or an unsolicited advertisement. In addition to the labor costs of sorting out the faxes received, a business might incur increased costs by having to purchase supplies more frequently because their paper and toner were being used for unwanted solicitation rather than business related purposes.

In Destination Ventures v. FCC, 46 F.3d 54 (9th Cir. Or. 1995), the court faced a similar issue regarding unsolicited fax advertisements. The defendants argued, "costs may be de minimis, and that computer technology is rendering these costs, as well as the problem of tying up fax machines, obsolete." However, the court concluded, "[Defendant's] own figures do not rebut the admitted facts that unsolicited fax advertisements shift significant advertising costs to consumers. The possibility of future technological advances allowing simultaneous transmission and eliminating the need for paper does not alter this conclusion." Id. at 58. Therefore, the court prohibited shifting advertising costs to the consumer even in light of potential technological advances.

Although Congress and the FCC allowed telemarketers to call consumers within an 18/3 month time period, the consumer did not incur any costs from the phone calls. Because the TCPA treats live telemarketing solicitations differently if they impose costs on the recipient, the durational limitation associated with fax machines should be treated differently than the limitations placed on live telemarketers. Therefore, the EBR for fax machine solicitation should not be allowed to continue for 18 months after a purchase or 3 months after an initial product inquiry. Instead, I would propose that businesses should be allowed to send prior customers an unsolicited fax advertisement only one month after the commercial transaction or not all.

III. Conclusion:

Although telemarketing and fax solicitations are very similar, the key difference that justifies the abandonment of adopting similar rules and regulations for them is the advertising costs being shifted from the advertiser to the consumer. Similarly, advertisers should not be allowed to force consumers to bear an unwanted cost. Congress and the FCC realized this concern and prohibited any telemarketing solicitations that would force the consumer to incur any cost. see *supra*. Similarly, fax solicitations should either be limited to a shorter period of time or not allowed at all, unless the consumer expressly consents to receive fax solicitations.

With technology advancing at a very rapid pace, businesses have many more options to reach both potential and prior customers in hopes of disseminating information about their new products or services. One major avenue that businesses can utilize, without burdening any customers or businesses, is the internet. I would assume that any office or person that owns a fax machine would also have access to the internet and at least one email address. As a result, businesses can send out email solicitations to consumers without imposing any unwanted advertising costs. Emailing a large number of consumers is a simple task and gives the recipient the option to read information or discard it. Therefore, this would be a much less intrusive way of advertising to previous and potential customers.

Another potential way for businesses to contact prior customers is through the use of instant messaging services. Although more people have email addresses, a large amount of people also use instant messenger services such as Aol Instant Messenger (AIM), Yahoo Messenger, MSN Messenger, etc. Through the use of these types of services, businesses would be able to instantly message a prior customer with valuable information. The customer would have the option to read the information, disregard it, or forever ban any more communications from that particular sender. The overwhelming benefit of using the internet is that the consumer has control of what he/she would want to do with the information without any additional cost to him/her.

IV. Recommendations:

I would recommend that the established business relationship regarding fax solicitations be given a much shorter durational limitation, rather than the 18/3 month rule, which is associated with telemarketing practices. Through the use of current technology, businesses have other options available to them in which to solicit prior customers. These methods are able to convey more information and are not as intrusive or costly to both the consumer and advertiser.

Respectfully Submitted by:

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Daniel Cho
April 26, 2006